The State Bar of California

Task Force on Access Through Innovation of Legal Services

To: ATILS Task Force
From: Wendy Chang and Toby Rothschild
Date: October 7, 2019
Re: B.1. Recommendation 1.0: The Task Force does not recommend defining the practice of law.

Recommendation 1.0 has received a total of approx. 275 comments, 82 in support, 184 in opposition, and 9 with no stated position.

Recommendation 1.0 (Practice of Law Definition) [UPL/AI]	
Recurring Point	Possible Response
This poses too much risk for consumers because the non-lawyers will not have been trained to provide competent legal services.	This recommendation responds to the Task Force's assignment to consider the definition of the "practice of law" in California. In connection with other Task Force proposals for new limited exceptions to UPL permitting certain regulated activities to promote the use of technology and innovative new delivery systems, this comment reflects the Task Force's view that changing the existing definition of the practice of law will not be effective in clarifying UPL restrictions, and is not necessary for the Task Force to consider the strategies under consideration. Proactive risk-based regulation of nonlawyer providers that relies on monitoring and auditing rather than the current after-the-fact only complaint-driven enforcement may be an effective public protection system for the State Bar or another regulator of nonlawyer providers. In addition to monitoring and auditing, imposing robust eligibility requirements on the front end can also be considered. In Washington State, for example, among the eligibility requirements to be a LLLT are: 45 hours of paralegal studies; 15 hours of family-law-specific course work from a law school, ABA approved paralegal program, or LLLT

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	Board; and 3,000 hours of law–related work experience supervised by an attorney.
The immigrant community at particular risk due to continued notario fraud. These proposals will exacerbate this problem.	This recommendation responds to the Task Force's assignment to consider the definition of the "practice of law" in California. In connection with other Task Force proposals for new limited exceptions to UPL permitting certain regulated activities to promote the use of technology and innovative new delivery systems, this comment reflects the Task Force's view that changing the existing definition of the practice of law will not be effective in clarifying UPL restrictions, and is not necessary for the Task Force to consider the strategies under consideration. Proactive risk-based regulation of nonlawyer providers that relies on monitoring and auditing rather than the current after-the-fact only complaint-driven enforcement may be an effective public protection system for the State Bar or another regulator of nonlawyer providers. In addition to monitoring and auditing, imposing robust eligibility requirements on the front end can also be considered. In Washington State, for example, among the eligibility requirements to be a LLLT are: 45 hours of paralegal studies; 15 hours of family-law-specific course work from a law school, ABA approved paralegal program, or LLLT Board; and 3,000 hours of law–related work experience supervised by an attorney. On the specific issue of notario fraud, implementation of UPL reforms could include consideration of whether to broadly exclude certain types of services and/or certain categories of consumer populations (such as consumer level

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	immigration services) and reserve those types and/or categories for inclusion in possible reforms at a future time, after review of and deliberation over public protection data gathered through a regulatory sandbox or an initial pilot program involving other categories of consumer populations.
Sharing fees with non-lawyers and permitting non-lawyer ownership will harm consumers because legal advice will be driven by either profit motive; or by those who are not at risk of discipline or malpractice liability.	This recommendation responds to the Task Force's assignment to consider the definition of the "practice of law" in California. In connection with other Task Force proposals for new limited exceptions to UPL permitting certain regulated activities to promote the use of technology and innovative new delivery systems, this comment reflects the Task Force's view that changing the existing definition of the practice of law will not be effective in clarifying UPL restrictions, and is not necessary for the Task Force to consider the strategies under consideration. In other recommendations, the Task Force is considering fee sharing reforms. That change to existing law would be to allow lawyers to share legal fees with nonlawyers, with the goal of facilitating the ability of lawyers to enter into financial arrangements with nonlawyers to develop or administer cutting-edge legal technology or innovative delivery systems, thereby lowering the lawyer's cost of delivery of legal services, and lowering the consumer cost to purchase those services. The task force was informed from discussions with legal technologists on the task force and otherwise, that a primary impediment to such arrangements is the inability of lawyers to share with nonlawyers any portion of the legal fees paid by clients. The Task Force hopes that by expanding the kinds of situations under which nonlawyers can share in legal fees, the

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	existing deterrent to collaboration will be minimized or completely alleviated, and innovation through technology or new delivery systems will be encouraged. Under the reforms under consideration for the relaxation of fee sharing restrictions, a lawyer would remain bound by all existing ethical rules, including the duty of competence, the duty to supervise nonlawyers, and the conflicts of interest prohibitions. In addition, regarding the Task Force's consideration of limited UPL exceptions for approved and regulated persons and entities, proactive risk-based regulation of the competence of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement may help mitigate or prevent consumer harm. On the specific issue of malpractice liability, an implementation of UPL reforms could include consideration of whether to impose a financial responsibility requirement on nonlawyer providers such as insurance, bonding, and/or contribution to a client security fund. Similarly, in considering implementation of Alternative Business Structures (ABS), there could be consideration of imposing specific regulatory oversight on the nonlawyer providers. For example, in the United Kingdom there are two significant regulatory requirements for approved ABS: (i) a nonlawyer owner must pass a "fitness to own test" aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that

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	that firms "have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook" and to "identify, monitor and manage risks to compliance."
It seems strange to create new eligibility and regulatory requirements for entities to do what lawyers do; since what lawyers do are already subject to eligibility and regulatory requirements	Imposing robust eligibility requirements could be carefully considered at an implementation stage. In Washington State, for example, among the eligibility requirements to be a LLLT are: 45 hours of paralegal studies; 15 hours of family-law-specific course work from a law school, ABA approved paralegal program, or LLLT Board; and 3,000 hours of law–related work experienced supervised by an attorney.
The State Bar currently struggles to regulate, investigate and discipline licensed attorneys. Adding non-lawyer individuals and entities to the pool of people/entities to be regulated would be problematic.	The existing after-the-fact complaint-driven attorney discipline system is different from the concept of proactive risk based regulation. Proactive risk-based regulation of approved and regulated non-lawyer providers that relies on monitoring and auditing rather than complaint-driven enforcement may be an effective public protection system for the State Bar or another regulator of nonlawyer providers. Also, imposing robust eligibility requirements on individual nonlawyer providers could be carefully considered at an implementation stage. In Washington State, for example, among the eligibility requirements to be a LLLT are: 45 hours of paralegal studies; 15 hours of family-law-specific course work from a law school, ABA approved paralegal program, or LLLT Board; and 3,000 hours of law–related work experienced supervised by an attorney.

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	Similarly, in considering implementation of Alternative Business Structures (ABS), there could be consideration of imposing specific regulatory oversight on the nonlawyer providers. For example, in the United Kingdom there are two significant regulatory requirements for approved ABS: (i) a nonlawyer owner must pass a "fitness to own test" aimed at assessing competence, honesty, integrity, reputation and financial soundness; and (ii) nonlawyers are subject to the Solicitors Regulation Authority (SRA) and the Legal Services Board that, among other things, impose the SRA Code of Conduct which mandates that that firms "have effective systems and controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook" and to "identify, monitor and manage risks to compliance."
There is no way that the state bar can sufficiently and adequately monitor the scope, extent, and nature of legal services and advice being rendered by these folks in order to ensure that they are not overstepping their permissible bounds. The State Bar would be unable to monitor such conduct until it's too late to protect the victims.	Proactive risk-based regulation of nonlawyer providers that relies on auditing and monitoring rather than complaint-driven enforcement may be an effective public protection system for the State Bar or another regulator of nonlawyer providers. In addition, imposing robust eligibility requirements can be considered.
The problem with access to legal services and justice is not the number of practitioners, but the lack of capacity of the courts and the ability of the courts to develop self-help projects to serve a wider public. What's needed is adequate court funding, restoration of the deep cuts made in the last decade and increased funding in addition	The Task Force was given a specific charge to study AI, technology and online delivery systems with the dual goals of increased access to legal services and public protection. A list of other potential different initiatives (i.e., not technology-driven initiatives) will be compiled as an appendix to the Task Force's final report. Court reform and court funding will be included in this list.

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UPL is not currently being enforced by law enforcement. That will not change and this problem will exacerbated by allowing additional market participants who may confuse consumers into believing they are entitled to offer legal services.	There is no empirical evidence to suggest that there will be an increase in UPL bad actors under these proposals. Eligibility standards, proactive risk-based regulation and a broad public education strategy will create an accessible objectively identifiable vetted alternative to the present UPL landscape, which can address public confusion and help to avoid public harm.
I agree that the longstanding statutory and case law regarding the unauthorized practice of law should not be disturbed. CA Rule 1-300(A) prohibits a lawyer from aiding any person or entity in the unauthorized practice of law. Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code section 6125 et seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See, People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code sections 17200 – 17208. See also, Opinion of the California Attorney General No. 93-303 (August 30, 1993).)	This recommendation responds to the Task Force's assignment to consider the definition of the "practice of law" in California. In connection with other Task Force proposals for new limited exceptions to UPL permitting certain activities to promote the use of technology and innovative new delivery systems, this comment reflects the Task Force's view that changing the existing definition of the practice of law might not be effective in clarifying UPL restrictions, and may unintentionally open doors for UPL bad actors to innovate around any over-narrow definition, resulting in an unnecessary risk for the Task Force to undertake when considering limited strategies for relaxing UPL restrictions. In general, consideration of limited exceptions to UPL to permit *regulated* nonlawyers to provide specified legal services is based on the Henderson Report's finding the UPL restrictions structure the legal services market. Regarding the specific concept of permitting individual nonlawyers to render limited legal services, proactive risk-based regulation that relies on auditing and monitoring rather than complaint-driven enforcement may be an effective public protection system for the State Bar or another regulator of nonlawyer providers. In addition, imposing robust eligibility requirements can be

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The ATILS Report reviewed the case law defining the parameters of the practice of law in California prohibited by Business and Professions Code section 6125 and determined that it was unnecessary to provide a definition of the practice of law, to consider whether to authorize non-attorneys or computer programs employing AI to engage in the provision of legal services. There is nothing in this recommendation to oppose. The case law concerning UPL is sufficient to determine the types of activities which constitute the practice of law in California.	This recommendation responds to the Task Force's assignment to consider the definition of the "practice of law" in California. In connection with other Task Force proposals for new limited exceptions to UPL permitting certain activities to promote the use of technology and innovative new delivery systems, this comment reflects the Task Force's view that changing the existing definition of the practice of law might not be effective in clarifying UPL restrictions, and may unintentionally open doors for UPL bad actors to innovate around any over-narrow definition, constituting an unnecessary risk for the Task Force to undertake when considering various limited strategies for relaxing UPL restrictions. Other groups (including the State Bar of CA and the ABA) that have considered UPL reforms have explored redefining the concept of the "practice of law," without success. If this were viewed by a commenter as being a preferable regulatory strategy, then opposing the Task Force's Recommendation 1.0 would make sense.